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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of:

**PETITION TO RESTYLE AND  
AMEND SUPREME COURT RULE  
31; ADOPT NEW RULE 33.1; AND  
AMEND RULES 32, 41, 42  
(VARIOUS ERs FROM 1.0 TO 5.7),  
46-51, 54-58, 60, AND 75-76**

Supreme Court No. R-20-0034

**COMMENT OF THE  
STATE BAR OF ARIZONA<sup>1</sup>**

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the “State Bar”) hereby submits the following as its Comment to the above-captioned Petition. The State Bar does not oppose nonlawyer ownership/investment in law firms (alternate business structures or ABS) and nonlawyer provision of legal services by limited license legal practitioners (LLLPs).

<sup>1</sup> This Comment was approved by the State Bar Board of Governors by a vote of thirteen (13) in favor, eight (8) opposed), and two (2) abstain.

1 The State Bar does however suggest additional analysis and clarification of certain  
2 issues raised by the Petition, as set forth herein, as well as a piloted implementation.

## 3 4 **DISCUSSION**

### 5 **I. Summary of the Petition**

6 The Petition arises from the October 2019 Report of the Court’s Task Force  
7 on Delivery of Legal Services.<sup>2</sup> The stated aim of the Petition is to significantly alter  
8 or delete existing rules, most notably Ethical Rule 5.4 of the Arizona Rules of  
9 Professional Conduct, Rule 42, Ariz. R. Sup. Ct., to allow and regulate 1) nonlawyer  
10 ownership/investment in law firms – “alternate business structures” (ABS) and 2)  
11 nonlawyer provision of some legal services<sup>3</sup> – limited license legal practitioners  
12 (LLLP). The Petition also restyles Rule 31. In total, the Petition impacts existing  
13 Rules 31, 32, 41, 42 (ERs 1.0, 1.5-1.8, 1.10, 1.17, 5.1, 5.3, 5.4, and 5.7), 46-51, 54-  
14 58, 60, 75, and 76 and sets out new Rule 33.1, Ariz. R. Sup. Ct. Related, the Court  
15 has also published associated proposed administrative code (ACJA) sections  
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20 <sup>2</sup> The Task Force made ten significant recommendations. This Comment addresses  
21 only the first (concerning ABS) and sixth (concerning LLLP). The Petition also  
22 includes a proposed restyle of Rule 31, which was the fifth Task Force  
23 recommendation. This Comment does not discuss that portion of the Petition, but  
24 the State Bar does not oppose the proposed restyle of Rule 31.

25 <sup>3</sup> LLLP practice areas include family law, civil and criminal practice before limited  
jurisdiction courts, and practice in administrative agencies. ACJA 7-210(F)(2).

1 governing ABS and LLLP.

2       Following the first of two consecutive comment periods, Petitioner filed a  
3 combined Amended Petition and Response to online forum comments. The  
4 Amended Petition includes additional proposed changes to the above-enumerated  
5 rules, as well as revisions to the proposed ACJA sections. The majority of the  
6 combined pleading, however, outlines Petitioner's consideration of forum comments  
7 on the Petition.  
8

## 9       **II. The Significant Unmet Legal Needs of Arizonans Warrants Reform.**

10       It is largely undisputed that civil practice legal services are unaffordable for  
11 many would-be consumers and that the resulting gap in services has not been, and is  
12 not likely to be, adequately answered by legal aid or pro bono or self-service.  
13

14       In its thoughtful scrutiny of what can be done, and how quickly, to update and  
15 expand the delivery of legal services, the Task Force arrived at, among other  
16 proposals, nonlawyer ownership of law firms (ABS) and nonlawyer practice of law  
17 (LLL). Clearly, these two proposals, in their nonlawyer expansion of the  
18 profession, represent significant change, a complete overhaul even, in law practice  
19 as we know it.  
20

21       The legal community commentary on this Petition has been vigorous,  
22 particularly with respect to whether the proposed reforms will modernize legal  
23 services delivery or increase innovation, thereby increasing access to justice. It is a  
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1 robust debate that is ongoing in other states, and at the national level, with Arizona  
2 poised to be the first to enact the kind of seismic reform projected by the Petition.

3 Without rehashing the well-developed body of points and counterpoints,<sup>4</sup> the  
4 State Bar concludes that, where incremental efforts at addressing the substantial  
5 unmet legal needs of Arizonans have failed, the Task Force's studied and more  
6 substantial proposals are reasonable and warranted. Further, the State Bar is prepared  
7 to assist in meaningful implementation aimed at modernizing the delivery of legal  
8 services, in line with its core mission to serve and protect the public with respect to  
9 the provision of legal services and access to justice. The State Bar is informed in this  
10 commitment by the ABA Commission on the Future of Legal Services' call for  
11 collaboration between state judiciaries and bar associations to explore ways of  
12 closing the access to justice gap through innovative solutions.<sup>5</sup>

### 16 **III. Identified Issues Warranting Further Analysis/Clarification**

17 The State Bar has identified several categories of issues it believes the revised  
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20 <sup>4</sup> The debate on nonlawyer ownership and nonlawyer practice has been captured,  
21 among other places, in the Opposition Statement to the Task Force Report, in CLEs,  
22 on the Court's online Rules Forum, at the State Bar's recent Board of Governors  
23 public meetings (February, April, and May), in the April 2020 Arizona Attorney  
24 magazine, and nationally for several years within the ABA and in academia.

25 <sup>5</sup> ABA Commission on the Future of Legal Services, *Report on the Future of Legal  
Services in the United States* 38 (2016) available at <https://bit.ly/2Ttx1YJ>.

1 rules create, warranting additional analysis and clarification if the ABS and LLLP  
2 expansions are to be meaningfully implemented.

### 3 **A. Protection of Public**

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5 In the interest of preserving minimum standards in the quality and  
6 independence of client representation, the State Bar notes the following public  
7 protection concerns with the creation and regulation of ABS and LLLP, not meant  
8 to be exhaustive:  
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- 10 • Suspended lawyers should not be able to engage in LLLP practice.
- 11 • A lawyer working as an LLLP should be required to report any lawyer  
12 discipline or suspension to the LLLP Board.
- 13 • Any ethical rule or regulation related to LLLP competence should  
14 contemplate the lower level of education and the fact that the body of  
15 case law on lawyer competence largely arises in malpractice actions,  
16 versus regulation/discipline.
- 17 • Beyond mere disclosure, due to much lower educational and licensing  
18 requirements, LLLP should be required to carry malpractice insurance  
19 as do similarly situated LLLT in Washington.<sup>6</sup>  
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24 <sup>6</sup> <https://www.wsba.org/for-legal-professionals/license-renewal/license-renewal-faqs/professional-liability-insurance>  
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- Regarding LLLP practice areas, ACJA 7-210(F)(2) should include a reference to statute or rule definition of limited jurisdiction court.
- LLLP should not be permitted to represent Respondents in attorney disciplinary proceedings.
- If LLLP will have client files and trust accounts, conservatorship rules should apply.
- Disability rules should apply to LLLP.
- The LLLP Client Protection Fund (CPF) should be a separate trust from the existing lawyer CPF.
- Suspended lawyers should not be ABS owners/investors or “authorized persons.”
- ACJA 7-209(G)(3)(a)(2) should require that ABS Compliance Attorneys be at the level of “authorized person.”
- All ABS authorized persons should be fingerprinted for records checks.
- ACJA 7-209(I) regarding ABS reinstatement following suspension or revocation should also apply to surrendered ABS licenses.
- ACJA 7-209(G)(2)(a) should require an ABS to adhere to Arizona Supreme Court rules, in addition to the ACJA code of conduct.
- ACJA 7-209(H)(2)(b) does not adequately limit the activities of a

1           suspended ABS.

2           **B. Scrivener Issues Impacting Clarity and Enforceability<sup>7</sup>**

3           A critical concern with the Petition is that it makes sweeping changes to many  
4 of the Rules of Professional Responsibility (“the ERs”) and key corresponding ER  
5 comments, seemingly in service to the creation and regulation of ABS and LLLP,  
6 but without consideration of other, existing lawyer regulation. Some of these  
7 concerns are listed below, along with other seeming scrivener issues, not meant to  
8 be exhaustive:  
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- 11           • The proposed ER 1.5 eliminates the requirement of joint responsibility  
12           for lawyers who share a fee.
- 13           • Does the duty of confidentiality apply to ABS nonlawyers providing  
14           exclusively nonlegal services? Should it?
- 15           • Are conflicts imputed related to ABS nonlawyer provision of nonlegal  
16           services? Should they be? Proposed ER 1.10 is unclear as to how  
17           nonlawyer conflicts are evaluated within an ABS.
- 18           • ABS and Entity are used interchangeably throughout the proposed  
19           rules/code.  
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24           <sup>7</sup> If the Petition is granted, the Lawyer Regulation arm of the State Bar specifically  
25           seeks the opportunity to assist the Court in redrafting ACJA 7-209(H) and (K)  
          regarding ABS discipline and code of conduct.

- Member is used ambiguously and inconsistently throughout the proposed rules/code.
- Professionalism is not defined.
- Out of state (foreign) lawyers are confusingly defined as nonlawyers.
- Rule 48(d) provides no standard of proof for LLLP.
- ER 5.7 has been eliminated although its contents are not covered elsewhere. This leaves current business structures without any regulation – lawyers could provide law related services that are not distinct from their provision of legal services without being subject to the Rules of Professional Conduct in the course of providing those services. This scenario does not require the formation of an ABS.
- Important instructional comments to numerous ERs, including ERs 1.7, 1.8, 1.17, 5.1, and 5.3, among others, have been deleted. Some content, moved to the rule, is not reflective of the meaning of the comment, or is inadequate to replace existing comments. Due to limited caselaw on ERs, comments to the ERs are often extremely helpful, to lawyers and in lawyer discipline, in interpreting and analyzing the rule.
- ACJA 7-209(H) regarding ABS discipline omits ADPCC, in conflict with Rules 50 and 55. ABS is incorporated in the discipline process,



1 but not sanctions.

- 2 • ACJA 7-210(G) regarding discipline of LLLP should cross-reference
- 3 Rule 54.
- 4
- 5 • Rule 75(a) should include LLLP members.
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- 7 • ACJA 7-209(A)'s reference to Rule 31.1(c) should be to Rule 31.1(b).
- 8
- 9 • ACJA 7-209(D)(3)(b)(3)(b)(i) should include disclosure of ABS
- 10 working papers to the State Bar.
- 11
- 12 • ACJA 7-209(D)(6) should indicate the State Bar will carry out its
- 13 responsibility according to both the Supreme Court Rules and the
- 14 ACJA code.
- 15
- 16 • There is no indication as to the disposition of any collected ABS civil
- 17 fines related to discipline.
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- 19 • ACJA 7-209(K)(1)(a) is missing conflicts rules, specifically ERs 1.11,
- 20 and 1.18.
- 21

### 22 **C. Other Impacts and Considerations**

- 23 • The Petition if adopted will be a significant departure from Model
- 24 Rules, impacting the use of ethics opinions and possibly reciprocal
- 25 admission.
- Existing civil and criminal privilege statutes do not cover LLLP.

- It is unclear whether malpractice carriers will insure LLLP under their limited education requirement.

## CONCLUSION

The State Bar of Arizona supports the Petition but recommends additional Task Force review of the issues raised herein and is willing to work with the Court on resolution of these issues to facilitate meaningful implementation of the ABS and LLLP proposals. Specifically, the State Bar seeks the opportunity to provide additional feedback, beyond the Comment periods, given the Court's ongoing work on these rules and code provisions. The State Bar is uniquely situated to offer such input.

Further, the State Bar recommends the risk-managed approach of a regulatory sandbox. The American Bar Association House of Delegates recently endorsed regulatory reforms to increase access to justice. However, ABA Resolution 115 encouraged states to collect and assess data regarding regulatory innovations both before and after adoption, to ensure proposals are effective in increasing access to justice and protect clients and the public interest. This recommendation for a piloted implementation is further informed by the thoughtful "test and evaluate" approach

1 to legal services reform currently underway in Utah<sup>8</sup> and under review in California.<sup>9</sup>

2 The State Bar supports a similarly measured approach to the need to update law  
3 practice and increase access to services.  
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6 RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of May, 2020.

7 /s/ Lisa M. Panahi  
8 Lisa M. Panahi  
9 General Counsel

10 Electronic copy filed with the  
11 Clerk of the Supreme Court of Arizona  
12 this 26<sup>th</sup> day of May, 2020.

13 by: Patricia Seguin  
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21 <sup>8</sup> [http://www.utcourts.gov/utc/rules-comment/2020/04/24/supreme-court-](http://www.utcourts.gov/utc/rules-comment/2020/04/24/supreme-court-regulatory-reform-proposal-comment-period-closes-july-23-2020/)  
22 [regulatory-reform-proposal-comment-period-closes-july-23-2020/](http://www.utcourts.gov/utc/rules-comment/2020/04/24/supreme-court-regulatory-reform-proposal-comment-period-closes-july-23-2020/)

23 <sup>9</sup> Bloomberg Law, “California Bar Trustees Move Toward New Regulatory  
24 ‘Sandbox,’” available at [https://news.bloomberglaw.com/us-law-week/california-](https://news.bloomberglaw.com/us-law-week/california-bar-trustees-move-toward-new-regulatory-sandbox)  
25 [bar-trustees-move-toward-new-regulatory-sandbox](https://news.bloomberglaw.com/us-law-week/california-bar-trustees-move-toward-new-regulatory-sandbox) (May 14, 2020) (State Bar Board voted 9-2 for pilot of nonlawyer ownership).